

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on: 17th October, 2016**

+ **CRL.M.C. 2339/2016 & Crl.M.A. 9782/2016 (stay)**

KARISHMA KHOSLA

..... Petitioner

Represented by: Mr. D. Hasija, Adv.

versus

STATE OF DELHI (NCT OF DELHI) & ANR

..... Respondent

Represented by: Mr. Hirein Sharma, APP with
ASI Sushila PS Patel Nagar.
Mr. Prosenjeet Banerjee, Adv.
for R-2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Aggrieved by the order dated 25th May, 2016 the petitioner who is the complainant in FIR No.1062/2015 under Section 406/498A registered at PS Patel Nagar prefers the present petition. An application was filed by the respondent No.2 husband of the petitioner, an accused in the FIR, before the learned Metropolitan Magistrate seeking directions to the investigating officer to take possession of the articles of the complainant lying in the house of respondent No.2. The said application was opposed by the petitioner claiming that she was residing in the matrimonial home and by way of the application praying for recovery of the articles, the respondent No.2 could not oust her from the matrimonial home. According to the

petitioner even as per the memo of parties in a petition filed by the respondent No.2 before the Family Court, Saket the present address of the complainant was that of the matrimonial home.

2. After hearing the parties the learned Trial Court allowing the application of respondent No.2 passed the following impugned order:

“This is an application moved on behalf of applicant/ accused seeking directions to the IO that she may take the possession of the articles of the complainant lying in the house of the accused.

Arguments have been advanced on behalf of the applicant, the State and the learned counsel for the complainant.

It is submitted by learned counsel for the applicant/ accused that in the present matter, the complainant has levied allegations against the accused that he has dishonestly retained the Istridhan articles of the complainant. But the same is a false proposition. The applicant/ accused wishes to give the articles of the complainant back to her but she is not accepting the same. It is submitted that the articles are unnecessarily occupying space in the house of the accused due to which he is facing space issues. Hence, as he does not require the custody of these articles and the articles are belonging to the complainant, necessary directions may be passed to this effect. The IO submits that on 9.11.2016, she had issued a notice to the accused to handover the istridhan articles of the complainant along with the admitted list. Thereafter, the applicant has offered to give the articles but the complainant has refused to collect the same, further the orders passed by this Court shall be complied with.

The application has been strongly opposed by learned counsel for the complainant stated that by way of this application, the accused words the IO to investigate the matter as per his terms and conditions. It is submitted that the investigation is prerogative of the IO and it cannot be streamlined as per wishes of the accused. Learned counsel has relied upon certain judgments wherein it has been held that even the Court cannot interfere in the investigation by the

Police as the same is in the exclusive arena of the executive. Further, learned counsel submits that the complainant is residing in the matrimonial house and by way of this application the accused wishes to oust her from there. In this regard, learned counsel has relied upon copy of memo of parties in a petition filed by the applicant/ accused before the learned Family Court, Saket, Delhi where the current address of the complainant is admitted to be the matrimonial house.

Learned counsel for accused has opposed the same. He submits that at the time of filing of the petition in the learned Family Court i.e. on 21.10.2014 admittedly the complainant was residing at the matrimonial house. However, now she is not residing there. The complainant has filed a matter under Domestic Violence Act before the learned Mahila Court at the learned Saket Court, Delhi where on 27.04.2016, she has admitted that she is now residing with her parents. Hence, it is submitted that the complainant is not residing there and the arguments of the learned counsel is false.

On specific enquiry from the counsel, learned counsel for the complainant admitted that currently the complainant is not actually physically residing at the matrimonial house. Learned counsel for the complainant has placed much reliance on the judgments filed today alleging that by way of present application the accused seeks investigation as per his whims and fancies. However, the Court is not inclined to accept this arguments. As per the report of the IO, she had given a notice to the accused to handover the dowry articles of the complainant. In compliance of the same, the accused has offered to handover the articles but the same are not accepting by the complainant. In view of the same, in the opinion of the Court, the judgments relied by learned counsel for the complainant do not apply the present application. In view of the facts and circumstances, the application is allowed.

The complainant is directed to collect her articles as per admitted list from the accused in the presence of the IO. In case of her failure to do so, the IO is directed to seize the articles as per law. Application is disposed off accordingly. Order to be given dasti to IO.”

3. Summing up the position in respect to the stridhan of a married woman and the applicability of Section 406 IPC, Supreme Court in the decision reported as (1985) 2 SCC 370 Pratibha Rani Vs. Suraj Kumar & Anr. held:

“27. In the instant case, there is also no question of the wife constituting herself a partner with her husband merely by allowing him to keep the articles or money in his custody. There is neither any pleading nor any allegation that after her marriage, the appellant transferred all her properties to her husband for carrying on a partnership business in accordance with the provisions of the Partnership Act. Thus, in our opinion, it cannot be said that a bare act of keeping stridhan property in the custody of the husband constitutes a partnership and, therefore, a criminal case under Section 406 IPC is not maintainable. It is not necessary for us to multiply cases on this point on which there does not appear to be any controversy. We have already pointed out that the stridhan of a woman is her absolute property and the husband has no interest in the same and the entrustment to him is just like something which the wife keeps in a bank and can withdraw any amount whenever she likes without any hitch or hindrance and the husband cannot use the stridhan for his personal purposes unless he obtains the tacit consent of his wife. When the essential conditions of a partnership do not exist the mere act or factum of entrustment of stridhan would not constitute any co-ownership or legal partnership as defined under Section 4 of the Partnership Act.

28. To sum up, the position seems to be that a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife nor can he burden her with losses of business by using the said property which was never intended by her while entrusting

possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under Section 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only a custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property.”

4. The Supreme Court in its decision reported as (2008) 2 SCC 561 Onkar Nath Mishra and Ors. Vs. State (NCT of Delhi) and Anr. explaining the ambit of offence of criminal breach of trust defined under Section 405 IPC and punishable under Section 406 IPC held:

“16. According to Section 405 IPC, the offence of criminal breach of trust is committed when a person who is entrusted in any manner with the property or with any dominion over it, dishonestly misappropriates it or converts it to his own use, or dishonestly uses it, or disposes it of, in violation of any direction of law prescribing the mode in which the trust is to be discharged, or of any lawful contract, express or implied, made by him touching such discharge, or wilfully suffers any other person so to do. Thus in the commission of the offence of criminal breach of trust, two distinct parts are involved.

“10. ... The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is a misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created.”

(See Supdt. & Remembrancer of Legal Affairs v. S.K. Roy [(1974) 4 SCC 230 : 1974 SCC (Cri) 399] , SCC p. 234, para 10.)

17.

18. In the present case, from a plain reading of the complaint filed by the complainant on 8-11-1994, extracted above, it is

clear that the facts mentioned in the complaint, taken on their face value, do not make out a prima facie case against the appellants for having dishonestly misappropriated the stridhan of the complainant, allegedly handed over to them, thereby committing criminal breach of trust punishable under Section 406 IPC. It is manifestly clear from the afore extracted complaint as also the relevant portion of the charge-sheet that there is neither any allegation of entrustment of any kind of property by the complainant to the appellants nor its misappropriation by them. Furthermore, it is also noted in the charge-sheet itself that the complainant had refused to take articles back when this offer was made to her by the investigating officer. Therefore, in our opinion, the very prerequisite of entrustment of the property and its misappropriation by the appellants are lacking in the instant case. We have no hesitation in holding that the learned Additional Sessions Judge and the High Court erred in law in coming to the conclusion that a case for framing of charge under Section 406 IPC was made out.”

5. Thus the two essential ingredients for offence punishable under Section 406 IPC are entrustment and refusal to return on demand. As noted in the impugned order, the complainant is not physically residing at the matrimonial home. Thus on the one hand the complainant wants to prosecute the respondent No.2 on the ground that on demand her stridhan articles have not been returned and at the same time insist that those articles should be retained in the matrimonial home and she be not compelled to receive them. In a prosecution for an offence punishable under Section 406 IPC the accused would be within his right to return the articles demanded because a failure to do so would attract the penal provision.

6. Learned counsel for the petitioner has not been able to point out any decision wherein recovery of articles pursuant to a complaint under Section

406 IPC by the investigating officer is not a part of the investigation. Once the complainant has sought dominion over her articles, the investigating officer is entitled to recover the same and hand over the dominion of the same to the complainant. Had the complainant been residing in a clearly marked portion of the matrimonial home, she could have insisted that the articles recovered be kept over there. As noted above the complainant is not residing at the matrimonial home and thus while seeking prosecution of the respondent No.2 for offence punishable under Section 406 IPC, she cannot at the same time claim that no recovery of the articles be made. If after demanding the goods, the complainant fails to receive the same it will be for the Court to draw an adverse inference if the facts so warrant.

7. Petition and application are accordingly dismissed.

(MUKTA GUPTA)
JUDGE

OCTOBER 17, 2016
‘ga’